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NTSB Order No. EA-5304

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of August, 2007

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket No. SE-17585
v.)	
)	
THOMAS S. McCARTHNEY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II in this matter,¹ issued following an evidentiary hearing held on June 27 and 28, 2006. The Administrator's order suspended respondent's commercial pilot certificate for 90 days, based on alleged

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

violations of 14 C.F.R. §§ 91.123(a) and (b),² and 91.13(a).³ The law judge found respondent had violated §§ 91.123(a) and (b), and 91.13(a), and reduced the suspension of respondent's commercial pilot certificate from 90 days to 60 days.⁴ We deny respondent's appeal.

The Administrator's October 20, 2005 order, which served as the complaint before the law judge, alleged that, on January 3, 2004, respondent operated as pilot-in-command of a Cessna 500 from St. Petersburg, Florida, to Jackson, Tennessee.⁵ The

² The relevant portions of 14 C.F.R. § 91.123(a) and (b) provide as follows:

§ 91.123 *Compliance with ATC clearances and instructions.*

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory ... When a pilot is uncertain of an ATC clearance, that pilot shall immediately request clarification from ATC.

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

³ Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

⁴ The Administrator did not appeal the law judge's reduction in sanction.

⁵ The record indicates that the Administrator's complaint was incorrect with regard to respondent's destination; the destination of the flight that is the subject of the alleged

complaint alleges that during this January 3, 2004 flight, respondent received a clearance and instruction from Air Traffic Control (ATC) to descend from flight level 350 to 310, and that respondent refused to comply with this clearance. In addition, the complaint alleges that ATC subsequently instructed respondent to turn to a 45-degree heading, and respondent again refused to comply with ATC's instruction. The complaint alleges that ATC informed respondent that, due to traffic, respondent would need to either descend or turn; consequently, respondent agreed to descend. As a result of respondent's alleged refusal to comply with ATC's instructions, the complaint alleges that respondent's aircraft was in potential conflict with other aircraft, and ATC instructed respondent to increase his aircraft's rate of descent to maintain an appropriate amount of separation from other aircraft. The complaint also alleges that respondent never declared an emergency, and that no emergency ever existed, during the flight at issue. As a result of these allegations, the Administrator alleges that respondent's failure to comply with ATC instructions was careless and reckless, and

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violations was St. Louis, Missouri. Tr. at 6-7. Accordingly, the law judge allowed the Administrator's counsel to amend the complaint. Tr. at 7.

that respondent violated 14 C.F.R. §§ 91.123(a) and (b), and 91.13(a).

At the hearing, the Administrator called FAA ATC Specialist and Front Line Manager Michael R. Medley. Mr. Medley was the controller with whom respondent communicated during the events at issue. See Exh. A-4 (transcript of ATC communications). Mr. Medley testified that air traffic controllers never consider an operator's fuel consumption when they issue directions to change altitude, and that, in general, ATC does not elaborate on the directions they give operators. Tr. at 33-34. Mr. Medley also testified that the entire ATC system is based on operators' "immediate compliance" with ATC, and that operators' conversations with ATC would render the system inoperative. Tr. at 57-58. The Administrator also called Certified Professional Controller Johnny C. Hughes to testify at the hearing. Mr. Hughes supervised Mr. Medley during the events in question, and spoke with respondent in a telephone conversation regarding respondent's alleged failure to comply with ATC instructions after the events. Exh. A-5 (transcript of telephone conversation). Mr. Hughes testified that he sought to speak with respondent after the events in question in order to ascertain whether any mitigating circumstances or justification for respondent's failure to comply existed. Tr. at 68.

Mr. Hughes testified that respondent did not offer ATC any reason why ATC should prioritize his aircraft in front of others, and that ATC's instruction that respondent begin to descend was not arbitrary. Tr. at 68-70. Mr. Hughes also stated that respondent was "emphatic" that safety was his primary goal during the flight. Tr. at 87. The Administrator also called Quality Assurance Specialist and ATC Specialist Robert L. Hyde to testify. Mr. Hyde explained that the Performance Data Analysis and Recording System (PDARS) recording for the flight in question indicates that three aircraft were less than 5 miles away from respondent's aircraft. Tr. at 99; Exh. A-7 (PDARS computer disc containing recording). Mr. Hyde testified that the traffic pattern in evidence indicates that ATC moved an American Airlines flight as a result of respondent's failure to comply with ATC instructions. Tr. at 103. Mr. Hyde also explained the Administrator's procedure for reporting operational errors in order to inform appropriate personnel of such errors, and work to prevent them in the future. Tr. at 106-109. At the conclusion of Mr. Hyde's testimony, the Administrator concluded her case.⁶

⁶ At the conclusion of the Administrator's case in chief, respondent moved to dismiss paragraph 9 of the Administrator's complaint, which alleged that, in order to avoid traffic in the area, ATC had to instruct respondent to increase the rate of his

During respondent's rebuttal of the Administrator's case, respondent provided his own testimony, during which he stated that complying with the initial ATC instruction, which directed him to descend to "31," would have "put [him] near [his fuel] reserves," which was dangerous. Tr. at 128. Respondent also testified that he had never learned to accept an ATC clearance "blindly," but instead considered it permissible to converse with ATC as necessary, when ATC gave him a clearance or instruction that he believed would render his flight unsafe. Tr. at 131. Respondent also testified that his statement to ATC, that he could not comply with the clearance because of "operational necessity," was a phrase that he frequently used, and defined it as "a way to operate the airplane to keep it safe." Id. Respondent testified that he was never in an emergency situation during the flight in question, and that he had enough fuel to arrive at his destination. Tr. at 140, 144. Respondent testified that he intended to arrive at his destination without exhausting any of the fuel in the aircraft's

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aircraft's descent. Tr. at 113-14. The law judge granted respondent's motion, holding that the Administrator had not proven the aforementioned allegation that she had placed in the complaint, and did not prove that this alleged event resulted in a violation of the Federal Aviation Regulations. Tr. at 115.

fuel reserves, and that he planned to have some additional fuel remaining. Tr. at 151, 174.

The law judge held that the evidence clearly established that respondent had heard ATC's instruction, but did not comply. Tr. at 195. The law judge also recognized that respondent did not have a minimum fuel or emergency situation. Tr. at 194, 197. The law judge concluded that the Board's case law regarding failure to comply with ATC instructions indicates that ATC instructions are not subject to bargaining or the need for verbal justification, and that operators must comply with ATC instructions or be subject to sanction. Tr. at 199-200. The law judge also held that respondent's deviation from ATC's instructions rendered respondent in violation of § 91.13(a), because such deviation is careless and reckless. Tr. at 200. Finally, the law judge held that respondent was not subject to a waiver of sanction under the Aviation Safety Reporting Program (ASRP), because respondent's conduct was not inadvertent, but was deliberate. Tr. at 201-202. The law judge ordered a suspension of respondent's certificate for a period of 60 days.⁷

⁷ The law judge reduced the suspension time from 90 days to 60 days, on the basis that respondent's conduct was not egregious enough to warrant the maximum suspension time of 90 days, under the Administrator's Sanction Guidance Table. Tr. 202-203; Exh. A-8 at 16, ¶ 12.

On appeal, respondent argues that the law judge erred in finding that respondent had violated §§ 91.123(a) and (b), and 91.13(a), because respondent responded to ATC's instructions in the safest possible manner, by advising ATC that he could not descend because a descent would compromise fuel reserves on his aircraft. Respondent also argues that because his primary concern was safety, finding that he violated § 91.13(a) by operating the aircraft in a careless or reckless manner would be inapposite. Respondent also contends that the law judge's choice of sanction is too severe, and that respondent is eligible for waiver of sanction under the ASRP, because he did not deliberately violate a regulation, and because he did not exhibit a wanton disregard for aviation safety. The Administrator opposes each of respondent's arguments, and urges us to affirm the law judge's decision.

We have long held that, given the time-sensitive nature of ATC communications and aviation operations, combined with the fact that air traffic controllers must communicate with multiple aircraft within the same short period of time, ATC instructions are not subject to negotiation. For example, in Administrator v. McGuire, 4 NTSB 1824 (1984), we stated as follows:

Instructions from ATC are not matters subject to negotiation or bargaining which have the effects of monopolizing the radio frequency and interfering with

the controller giving an appropriate degree of attention to other aircraft under his control. Timely response to ATC instructions, and continuing adherence to clearances, are essential to the functioning of the ATC system and its purpose of providing safe traffic separation.

Id. at 1827 (footnote omitted). We reiterated this principle in Administrator v. Jesch, 7 NTSB 1256, 1257 (1991), in which we found that an operator's concern for traffic in a certain location did not justify his refusal to comply with an ATC instruction. We have adhered to this standard of stringent compliance with ATC instructions in a number of cases. See, e.g., Administrator v. McKinley, 7 NTSB 798, 800 (1991); Administrator v. Degan, 1 NTSB 1904, 1907 (1972). Moreover, we have also held that an operator's failure to adhere to an ATC instruction will often render the operator in violation of § 91.13(a), because, in general, such refusal is careless and reckless. See, e.g., Administrator v. Heras, NTSB Order No. EA-5102 at 2 (2004); Administrator v. Ferger, NTSB Order No. EA-4228 at 3 (1994).

Respondent also argues that the law judge's choice of sanction is inappropriate, and contends that he is eligible for a waiver of sanction under the ASRP.⁸ We reject respondent's

⁸ The ASRP may allow for a waiver of the imposition of a sanction, despite the finding of a regulatory violation, as long as the party that files the report meets certain other

argument that the law judge erred in finding him ineligible for a waiver of sanction. In carefully evaluating all evidence in the record, the law judge concluded that respondent's failure to comply with ATC instructions in a timely manner was deliberate and knowing, rather than by mistake or due to a lack of knowledge. Tr. at 201. The law judge concluded that respondent did not want to descend because he knew that his aircraft would use more fuel at a lower altitude; as such, respondent's refusal was not inadvertent. Tr. at 202. The law judge also stated that respondent "simply did not want to have to change his flight plan to accommodate other traffic." Tr. at 197. We agree with the law judge's conclusions regarding respondent's ineligibility for a waiver of sanction under the ASRP. At the time of the events at issue, respondent knew that he was failing to comply with ATC's instructions. Moreover, respondent refused to comply with ATC's instructions more than once: ATC first

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requirements. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA) concerning the violation, and the report may obviate the imposition of a sanction where: (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation. Id.

instructed respondent to descend to flight level 310, and then instructed respondent to maintain flight level 350 and turn to a 45-degree heading. Respondent refused both of these instructions, stating that such a descent and turn were not in his flight plan. Exh. A-4 at 3. Given that respondent heard and understood ATC's instructions, yet refused to comply, we find that the law judge did not err when he concluded that respondent was not eligible for a waiver of sanction under the ASRP.

Also with regard to sanction, respondent argues that we should conclude that a 60-day suspension period is egregious, given respondent's concern for aviation safety. We note that, in general, we will defer to the Administrator's choice of sanction when the Administrator includes her Sanction Guidance Table in the record. Garvey v. NTSB, 190 F.3d 571, 581 (D.C. Cir. 1999) (directing the Board to defer to the Administrator with regard to a respondent's sanction, when the Board had reduced the sanction on the basis that the pilot had acted "responsibly and prudently"); Administrator v. Law, NTSB Order No. EA-5221 at 4 (2006) (deferring to the Administrator's choice of sanction); see also Go Leasing v. NTSB, 800 F.2d 1514, 1518 (9th Cir. 1986) (recognizing that Federal Aviation Act authorizes Administrator to issue orders suspending, revoking,

amending, or modifying aviation certificates in interests of safety, and holding that the Administrator may decide which certificate action is appropriate). Here, the Administrator has offered the FAA Sanction Guidance Table into evidence, and asserted that the Table directs a 30- to 90-day suspension period for failure to adhere to ATC instructions. Exh. A-8 at 16, ¶ 12; Tr. at 167-68. Therefore, based on our finding that respondent has violated §§ 91.123(a) and (b) and 91.13(a), a suspension period of 30 to 90 days is appropriate in this case. We agree with the law judge's determination that a 60-day suspension period is proper, based on the aforementioned facts.

The Board finds that safety in air commerce or air transportation and the public interest requires the affirmation of the law judge's initial decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.⁹

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁹ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).